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Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction

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Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction

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I. INTRODUCTION

"The fiction is like a scaffolding in that it can be removed with ease."¹

Pursuant to the federal estate and gift tax unlimited marital deduction, married individuals can transfer property to each other tax-free during life or at death.² The marital deduction is based on the theory that a married couple is a single taxpaying unit and that transfers within this unit should be disregarded.³ As a general rule, a transfer of property will only qualify for the marital deduction if it grants the surviving spouse (or donee spouse⁴) outright ownership or an equivalent thereof ("Terminable Interest Rule").⁵ This ensures that the transferred property will be included in the surviving spouse's transfer tax base. Transfer taxes will be deferred but not escaped.⁶

An exception to the Terminable Interest Rule allows a donor spouse to receive the marital deduction for the full value of property in which he⁷ grants a surviving spouse nothing more than an income interest if the property meets the requirements of qualified terminable interest property ("QTIP Property"),⁸ set forth in section 2056(b)(7) of the Internal Revenue Code ("Code"). The donor spouse then receives

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1. See L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513, 529 (1931) [hereinafter Fuller, *Fictions II*].
 2. See I.R.C. § 2056(a) (2005); Treas. Reg. § 20.2056(a)-1(a) (as amended in 1994).
 3. See S. REP. NO. 97-114, at 127 (1981) ("[A] husband and wife should be treated as one economic unit for purposes of estate and gift taxes.").
 4. This Article refers throughout to the "surviving spouse" because it primarily addresses testamentary dispositions of QTIP Property. Unless otherwise indicated, its conclusions are equally applicable to donee spouses who receive qualifying income interests from *inter vivos* dispositions of QTIP Property.
 5. See I.R.C. § 2056(b); Treas. Reg. § 20.2056(b)-1(c) (as amended in 1994). For a general discussion of dispositions that qualify for the federal estate and gift tax marital deduction, see Wendy C. Gerzog, *Estate of Clack: Adding Insult to Injury, or More Problems with the QTIP Tax Provisions*, 6 S. CAL. REV. L. & WOMEN'S STUD. 221, 223 (1996) [hereinafter Gerzog, *Adding Insult to Injury*].
 6. See *Estate of Letts v. Comm'r*, 109 T.C. 290, 295 (1997) ("It is a basic policy of the marital deduction that property that passes untaxed from a predeceasing spouse to a surviving spouse is included in the estate of the surviving spouse.").
 7. This Article follows the general trend in scholarship on QTIP Property and refers to the donor spouse as "he" and the surviving spouse as "she" because males are statistically richer but have shorter life spans. See Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1729 n.3 (1998); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. 137, 157 n.81 (1991); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 305 n.11 (1995) [hereinafter Gerzog, *Illogical and Degrading*]; Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say it Ain't So*, 76 N.C. L. REV. 1597, 1605 (1998) [hereinafter Gerzog, *Illogical and Sexist*].
 8. See I.R.C. § 2056(b)(7)(B)(i); Treas. Reg. § 20.2056(b)-7 (as amended in 1994).

the marital deduction without surrendering control over the ultimate disposition of the property.⁹

Since the enactment in 1981 of the provisions of the Code that created this exception ("QTIP Provisions"),¹⁰ many articles have analyzed and critiqued the requirements for qualification for the initial marital deduction.¹¹ Far fewer have addressed the subsequent taxation of QTIP Property in the hands of the surviving spouse.¹² This second component of the QTIP Provisions, arguably more significant because it justifies the first, is the subject of this Article.

The taxation of QTIP Property can occur at three different points in time: at the surviving spouse's death;¹³ at the surviving spouse's lifetime disposition of her income interest;¹⁴ and at a remainderman's disposition of a QTIP remainder interest.¹⁵ The first two situations are addressed by sections 2044 and 2519 of the Code ("QTIP Taxing Provisions"), respectively. The third is addressed by various rulings ("QTIP Rulings")¹⁶ of the Internal Revenue Service ("Service").

This Article evaluates the QTIP Taxing Provisions and the QTIP Rulings. Part II explains that in doing so, it relies on the theory of legal fictions. This theory provides a conceptual tool by which to understand all aspects of the QTIP Provisions. Part III provides background for the analysis that follows by reviewing the marital deduction provisions, the Terminable Interest Rule, and the QTIP Provisions. Part IV demonstrates that the decision to grant the marital deduction for QTIP Property can be explained by means of a legal fiction that treats QTIP Property as passing in its entirety to the surviving spouse ("Ownership Fiction"). The Ownership Fiction ensures that the QTIP Property will ultimately be taxed in the surviving spouse's transfer tax base. This taxation is the topic of Parts V and

9. See I.R.C. §§ 2056(b)(7), 2523(f).

10. See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a)(1)(A), 95 Stat. 172, 301 (1981).

11. See Dodge, *supra* note 7, at 1729 n.3; Gerzog, *Adding Insult to Injury*, *supra* note 5, at 223; Gerzog, *Illogical and Degrading*, *supra* note 7, at 305 n.11; Wendy C. Gerzog, *Solutions to the Sexist QTIP Provisions*, 35 REAL PROP. PROB. & TR. J. 97 (2000) [hereinafter Gerzog, *Sexist QTIP Provisions*]; Gerzog, *Illogical and Sexist*, *supra* note 7, at 1605; Jay A. Soled, Dena L. Wolf & Nathan E. Arnell, *Funding Marital Trusts: Mistakes and their Consequences*, 31 REAL PROP. PROB. & TR. J. 89 (1996); Jerome M. Strauss & Daniel S. Corsaro, *'Perfecting' a QTIP Election: Old Problem, New Cure*, 35 RES GESTAE 484 (1992); Nancy Trethewey, *Trust Assets were QTIP Despite Limit on Spouse's Right to Stub Income: Estate of Shelfer v. Commissioner*, 50 TAX L. 459 (1997).

12. The Author is unaware of any law review articles that specifically address the taxation of QTIP Property.

13. See I.R.C. § 2044; Treas. Reg. § 20.2044-1(a) (as amended in 1998).

14. See I.R.C. § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

15. See *infra* text accompanying notes 198-223.

16. See Rev. Rul. 98-8, 1998-1 C.B. 541; I.R.S. Priv. Ltr. Rul. 99-08-033 (Nov. 30, 1998); see also *infra* text accompanying notes 198-223.

VI, which address the QTIP Taxing Provisions and the QTIP Rulings, respectively. This Article concludes that the QTIP Taxing Provisions lead to equitable results when applied by their terms, but inequitable and inconsistent results when extended beyond their terms by the QTIP Rulings.

II. LEGAL FICTIONS

In the nineteenth and early twentieth centuries, legal fictions were the topic of great interest to academics. Prominent writers such as Bentham, Blackstone, Maine, and Fuller debated the question of whether fictions had a role in the law and, if so, the nature of that role.¹⁷ Today, legal fictions are widespread throughout all areas of law, but they receive little attention from academics.¹⁸ One recent commentator remarked,

The legal fiction used to be a hot topic on the jurisprudential agenda. It was written and talked about passionately by those who wrote and talked about such things in the nineteenth and early twentieth centuries. Then interest in the subject withered and died, and virtually fell off the vine.¹⁹

The same commentator posed the following logical question: "Why would anyone want to write, or read for that matter, an article about a formerly hot topic?"²⁰ The answer is that a discussion of legal fictions is necessary to a thorough discussion of the QTIP Provisions. The Ownership Fiction provides the theoretical basis for granting the marital deduction at the death of the first spouse to die²¹ and for taxing the QTIP Property at a later point in time.²² Understanding legal fictions in general, and the Ownership Fiction in particular, is therefore critical to understanding and justifying the taxation of QTIP Property.

In using the theory of legal fictions to examine and critique current law regarding QTIP Property, this Article does not seek to revive the debate over the merits of legal fictions or over their proper definition. It assumes that legal fictions are an inescapable part of the law and takes as its starting point the definition of a legal fiction set forth by Lon L. Fuller, whose 1930 and 1931 articles on legal fictions are still relied upon as the most comprehensive discussion on the topic to

17. See Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2003); Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 CORNELL L. REV. 139 (1992).

18. See Harmon, *supra* note 17, at 1; Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 874 (1986).

19. Harmon, *supra* note 17, at 1.

20. *Id.*

21. See *infra* text accompanying notes 132–41.

22. See *infra* text accompanying notes 132–41.

date.²³ The remainder of this Part reviews Fuller's thoughts on (i) the elements of a legal fiction and (ii) the potential dangers of a legal fiction.²⁴

A. The Elements of a Legal Fiction

A legal fiction is a conceptual tool, a "device of legal thought and expression" that places a new legal result into a pre-existing conceptual structure.²⁵ In so doing, it explains and justifies the result. Fuller compares a legal fiction to scaffolding, in that it supports a given legal result but can be "removed with ease" when need be.²⁶

A legal fiction is an apparent falsehood, but it is neither a lie nor an erroneous conclusion.²⁷ Fuller distinguishes a legal fiction from a lie in that a fiction is not intended to deceive,²⁸ and from an erroneous conclusion in that a fiction is adopted with knowledge of its falsity.²⁹ The author of the legal fiction "either positively disbelieves it, or is partially conscious of its untruth or inadequacy."³⁰

An author uses a legal fiction precisely because of its falsity, which counterintuitively serves as "a metaphorical way of expressing a truth."³¹ The fiction's underlying analogy re-characterizes the form of a given situation to express what is perceived to be its substantive reality. For example, "the doctrine of constructive receipt is based on the [analogy] that once a taxpayer has an unrestricted right to a sum of money that has actually been set aside for her," though not yet delivered to the taxpayer, "the situation is more akin to the taxpayer's having possession of the money" than it is to not having possession of the money.³² The doctrine's falsity, that a taxpayer is in possession of money that she has not yet received, is thought to represent the economic reality of the situation.³³

This re-characterization brings a new situation within, or excludes a new situation from, the scope of an existing rule.³⁴ And this process

23. See L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363 (1930) [hereinafter Fuller, *Fictions I*]; Fuller, *Fictions II*, *supra* note 1; L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 877 (1931) [hereinafter Fuller, *Fictions III*].

24. As summarized from Fuller's three articles entitled *Legal Fictions*, which comprehensively cover the theory of legal fictions. See Fuller, *Fictions I*, *supra* note 23; Fuller, *Fictions II*, *supra* note 1; Fuller, *Fictions III*, *supra* note 23.

25. Fuller, *Fictions II*, *supra* note 1, at 513.

26. *Id.* at 529.

27. See Fuller, *Fictions I*, *supra* note 23, at 367-68.

28. See *id.* at 367.

29. See *id.* at 368.

30. *Id.*

31. *Id.* at 370.

32. John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. COLO. L. REV. 1, 6 (1993).

33. See *id.*

34. See Fuller, *Fictions II*, *supra* note 1, at 516.

of inclusion or exclusion, in turn, justifies a legal result that would otherwise seem incorrect or unfair.³⁵ The doctrine of constructive receipt brings sums of money set aside for, though not yet delivered to, a taxpayer within the scope of pre-existing tax laws that operate on money received by taxpayers.³⁶ Initially, it appears unfair to tax an individual on sums of money that she has not yet received. It appears more acceptable, however, when the situation is likened to actual receipt and the individual is characterized as being in the same economic situation as if she had received it.³⁷ Fuller explains that "[i]f we can create the impression of a similarity (in fact and not simply in legal effect) . . . we will have established . . . a kind of vicarious persuasive force"³⁸ that will "induce conviction that a given legal result is just and proper."³⁹

Through this process of comparison and justification, a legal fiction is able to reconcile a given legal result with pre-existing laws and premises that the result would otherwise contradict.⁴⁰ The doctrine of constructive receipt reconciles the legal result of taxing an individual on money not yet in her possession with the general principle that money is only taxed when received.⁴¹ As discussed below, the Ownership Fiction reconciles the decision to grant the marital deduction for QTIP Property with the Terminable Interest Rule. Fuller identifies this as the primary utility of a legal fiction: "to reconcile a specific legal result with some premise or postulate."⁴²

B. The Dangers of a Legal Fiction

The flipside of a legal fiction's utility is its potential danger. Fuller warns that "[a] fiction taken seriously, i.e., 'believed,' becomes dangerous and loses its utility"⁴³ and that "[a] fiction becomes wholly safe only when it is used with a complete consciousness of its falsity."⁴⁴ Fuller explains that to avoid the danger to which he refers, the "fiction must drop out of the final reckoning."⁴⁵

In the most general terms, "dropping the fiction" involves acknowledging the falsity of a legal fiction and refraining from using the fiction where it does not serve as a "metaphorical way of expressing a

35. See *id.* at 514.

36. See Miller, *supra* note 32, at 6.

37. See *id.*

38. Fuller, *Fictions I*, *supra* note 23, at 381.

39. Fuller, *Fictions II*, *supra* note 1, at 517.

40. *Id.* at 514.

41. See Miller, *supra* note 32, at 6.

42. Fuller, *Fictions II*, *supra* note 1, at 514.

43. Fuller, *Fictions I*, *supra* note 23, at 370.

44. *Id.*

45. See Fuller, *Fictions III*, *supra* note 23, at 895.

truth.”⁴⁶ Fuller explains that a fiction can sometimes be dropped simply by acknowledging that certain of its meanings are inappropriate for the case at hand.⁴⁷ With respect to the legal fiction that treats a corporation as a person,⁴⁸ the fiction can be dropped “by extracting from the word ‘person’ (when it is applied to corporations) all those qualities and attributes not legally appropriate to the corporation.”⁴⁹ No one would argue that a corporation has the legal right to bequeath property by will, so this aspect of a person’s legal rights is extracted from the word “person” when applied to corporations.

Sometimes a fiction must be dropped in its entirety to avoid unjust or incorrect results. For example, when a corporation acts as an alter ego of its shareholders, the fiction that the corporation is an independent person is dropped in its entirety.⁵⁰ This allows a plaintiff to “pierce the corporate veil” and sue the corporation’s shareholders. If the fiction were not dropped, the shareholders would be able to hide behind it to advance their private interests.⁵¹

To understand when a legal fiction can be relied upon and when it must be dropped, the “scaffolding” of the legal fiction must be removed from the legal result that it facilitates. This will reveal the nature of the fiction’s role. Where a fiction serves as a metaphor for a truth, it can and should be relied upon to facilitate equitable results. Where it has no ability to express a truth, however, it must be dropped to avoid unjust and unfair results. Before Parts IV through VI remove the “scaffolding” of the Ownership Fiction from the taxation of QTIP Property, Part III reviews the marital deduction provisions, the Terminable Interest Rule, and the QTIP Provisions.

III. THE MARITAL DEDUCTION, THE TERMINABLE INTEREST RULE, AND THE QTIP PROVISIONS

The marital deduction⁵² and the QTIP Provisions,⁵³ enacted pursuant to the Economic Recovery Tax Act of 1981,⁵⁴ represented a fundamental change in the taxation of transfers between spouses.⁵⁵ This

46. Fuller, *Fictions I*, *supra* note 23, at 370.

47. See Fuller, *Fictions III*, *supra* note 23, at 896.

48. See *id.*

49. *Id.*

50. See, e.g., *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1934).

51. See *id.*

52. See I.R.C. § 2056(a) (2005); Treas. Reg. § 20.2056(a)-1(a) (as amended in 1994).

53. See I.R.C. §§ 2044, 2056(b)(7)(B)(ii)(II); Treas. Reg. § 20.2044-1(a) (as amended in 1998); see also I.R.C. § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

54. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a)(1)(A), 95 Stat. 172, 301 (1981).

55. See Larry W. Gibbs, *Basic Federal Estate and Gift Taxation*, 17 ST. MARY’S L.J. 809, 814 (1986).

Part provides a brief history of the marital deduction followed by an analysis of current law regarding the marital deduction, the Terminable Interest Rule, and the QTIP Provisions. In so doing, this Part sets the stage for the discussion of the Ownership Fiction that begins in Part IV.

A. The Marital Deduction

Prior to 1948, when the first formulation of the federal estate tax marital deduction was enacted,⁵⁶ married couples in community property states received estate tax benefits that were unavailable to married couples in common law states.⁵⁷ In community property states, one-half of a married couple's community property was deemed to be owned by the first spouse to die while the other half was deemed to be owned by the survivor.⁵⁸ As a result, at the death of the first spouse to die, regardless of which spouse that was, only one-half of the couple's community property passing to the surviving spouse was subject to estate taxes.⁵⁹ In common law states, in contrast, all property passing to a surviving spouse was subject to estate taxes at the death of the first spouse to die.⁶⁰ Married couples in community property states could therefore defer estate taxes on one-half of their property until the death of the second spouse to die while married couples in common law states could not.⁶¹

The Revenue Act of 1942 ("1942 Act")⁶² addressed this inequality by defining a decedent's gross estate to include all community property owned by the decedent and the decedent's surviving spouse.⁶³ This provision, which denied married couples in community property states the previously enjoyed benefits of tax deferral,⁶⁴ proved highly

56. See Revenue Act of 1948, Pub. L. No. 80-471, § 361, 62 Stat. 110, 117-21 (1948).

57. See RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 5.06[1], at 5-102 (8th ed. 2005); Howard E. Abrams, *A Reevaluation of the Terminable Interest Rule*, 39 TAX L. REV. 1, 3 (1983); Willard H. Pedrick, *The Revenue Act of 1948: Income, Estate and Gift Taxes—Divided They Fall*, 43 ILL. L. REV. 277, 293-94 (1948).

58. See STEPHENS ET AL., *supra* note 57, ¶ 5.06[10], at 5-184; Abrams, *supra* note 57, at 3; Pedrick, *supra* note 57, at 293-94.

59. See STEPHENS ET AL., *supra* note 57, ¶ 5.06[10], at 5-184; Pedrick, *supra* note 57, at 293-94; Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1125-26 (1948).

60. See Abrams, *supra* note 57, at 3.

61. See *id.*

62. Revenue Act of 1942, Pub. L. No. 77-753, § 402(b), 56 Stat. 798, 942 (1942) (amending I.R.C. § 811(e)), *repealed by* Revenue Act of 1948, Pub. L. No. 80-471, § 351(b), 62 Stat. 110, 116 (1948).

63. See *id.*

64. See *id.*

unpopular.⁶⁵ It was repealed by the Revenue Act of 1948 ("1948 Act"),⁶⁶ and was replaced by the first formulation of the estate tax marital deduction, which allowed a deduction for one-half of a decedent's non-community property assets that passed to a surviving spouse.⁶⁷ The 1948 Act took the opposite approach from the 1942 Act in achieving the goal of providing equal treatment to couples residing in all states.⁶⁸ Rather than denying the favorable pre-1942 community property treatment to married couples in community property states, it granted such treatment to married couples in common law states.⁶⁹ As a result, couples in common law states could defer taxes on one-half of the property passing to a surviving spouse by virtue of the marital deduction, just as couples in community property states could do by virtue of the community property laws. The 1948 Act also introduced new income tax provisions, allowing a married couple to split their incomes between husband and wife by filing a joint income tax return.⁷⁰ In effect, these provisions treated married couples as single taxpaying units for income tax purposes. Some commentators advocated treating married couples the same way for estate tax purposes, disregarding transfers between spouses and taxing property only when it left the marital taxpaying unit.⁷¹ This theory of a marital unit, not adopted by the 1948 Act, would eventually become the basis of the marital deduction.⁷²

The marital deduction remained unchanged until 1976, when Congress (i) increased the deduction "to the greater of \$250,000 or one-half of the decedent's adjusted gross estate" and (ii) enacted a gift tax component that allowed \$100,000 of gifts and one-half of gifts in ex-

65. See *Revenue Revisions, 1947-48: Hearings on Community Property and Family Partnerships Before the H. Comm. on Ways and Means*, 80th Cong. 766-67 (1947) (statement of J. Paul Jackson).

66. Revenue Act of 1948 § 351.

67. See *id.* § 361.

68. See Abrams, *supra* note 57, at 4-5.

69. See *Reduction of Individual Income Taxes: Hearings on H.R. 4790 Before the S. Comm. on Finance*, 80th Cong. 24 (1948) [hereinafter *Hearings on H.R. 4790*] (statement of John W. Snyder, Secretary of the Treasury); *id.* at 311 (testimony of Allan H. W. Higgins, Chairperson of the ABA Section of Taxation, Committee on Equalization of Taxes in Community-Property and Common-Law States); Paul E. Anderson, *The Marital Deduction and Equalization Under the Federal Estate and Gift Taxes Between Common Law and Community Property States*, 54 MICH. L. REV. 1087, 1087 (1956); Surrey, *supra* note 59, at 1128.

70. See *Hearings on H.R. 4790*, *supra* note 69, at 310-11 (colloquy between Sen. Scott Lucas and Allan H. W. Higgins, Chairperson of the ABA Section of Taxation, Committee on Equalization of Taxes in Community-Property and Common-Law States); STEPHENS ET AL., *supra* note 57, ¶ 5.06[1], at 5-102; Abrams, *supra* note 57, at 4-5.

71. See Abrams, *supra* note 57, at 10.

72. See *id.* at 12.

cess of \$200,000 to pass tax-free between spouses.⁷³ To ensure that all married individuals would receive the same benefits from the increased deduction,⁷⁴ decedents in community property states were allowed to deduct the greater of \$250,000 or one-half of the value of their estate calculated to include their spouse's share of community property.⁷⁵ The stated intent of Congress with respect to these changes was to allow married couples to transfer small or moderate estates to each other free of federal estate taxes.⁷⁶

Five years later, pursuant to the Economic Recovery Tax Act of 1981 ("ERTA"),⁷⁷ Congress eliminated the quantitative limits on both the estate and gift tax marital deductions.⁷⁸ The unlimited estate tax marital deduction is codified in section 2056(a);⁷⁹ the unlimited gift tax marital deduction is codified in section 2523(a).⁸⁰ This Article exclusively addresses the unlimited estate tax marital deduction, referred to hereinafter as the marital deduction.⁸¹

ERTA shifted the focus of the estate and gift tax marital deduction from treating all married couples alike to treating all married couples as single taxpaying units, as originally proposed in 1948.⁸² The legislative history reveals that in initiating this shift, Congress felt that it was fair to treat a married couple's property as the couple themselves

73. S. REP. NO. 94-938, pt. 2, at 14 (1976); see I.R.C. § 2056(c)(1)(A) (1981), *repealed by Economic Recovery Tax Act of 1981*, Pub. L. No. 97-34, § 403(a)(1)(A), 95 Stat. 172, 301 (1981); see also STEPHENS ET AL., *supra* note 57, ¶ 5.06[5][b], at 5-122 to -127.

74. See Pedrick, *supra* note 57, at 303; Norman A. Sugarman, *Estate and Gift Tax Equalization—The Marital Deduction*, 36 CAL. L. REV. 223, 225 (1948); Surrey, *supra* note 59, at 1127-29.

75. See I.R.C. § 2056(c)(1)(C), *repealed by Economic Recovery Tax Act of 1981* § 403(a)(1)(A); see also Abrams, *supra* note 57, at 11-12.

76. See H.R. REP. NO. 94-1380, at 17 (1976); S. REP. NO. 94-938, pt. 2, at 14.

77. Economic Recovery Tax Act of 1981 § 403(a)(1)(A).

78. See *id.* § 403(d)(1); STAFF OF THE J. COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 233-34 (Comm. Print 1981) [hereinafter J. COMM. EXPLANATION OF ERTA].

79. See I.R.C. § 2056(a) (2005) ("For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.").

80. See I.R.C. § 2523(a) (2004) ("Where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.").

81. Unless otherwise specified, this Article's conclusions are equally applicable to the unlimited gift tax marital deduction.

82. See H.R. REP. NO. 97-201, pt. 1, at 159 (1981); STEPHENS ET AL., *supra* note 57, ¶ 5.06[10], at 5-186.

treat it: as "theirs," as opposed to "his" or "hers."⁸³ The history states that married couples commingle property during marriage and make decisions with respect to such property jointly, treating it as belonging to the unit rather than to either individual.⁸⁴ As an additional justification, Congress noted that an unlimited deduction would significantly simplify the estate and gift taxes by eliminating the need to determine which spouse's funds were used to acquire property held within the marital unit.⁸⁵

B. The Terminable Interest Rule

In establishing the unlimited marital deduction, section 2056(a) of the Code is specifically limited by section 2056(b),⁸⁶ which sets forth the Terminable Interest Rule.⁸⁷ The Terminable Interest Rule provides that property passing from a decedent spouse will not qualify for the marital deduction if the surviving spouse's rights in such property will terminate or fail upon "the lapse of time, or the occurrence of an event or contingency, or on the failure of an event or contingency to occur,"⁸⁸ and if such termination or failure will allow some other person to enjoy or possess the property in which the surviving spouse had the interest.⁸⁹

First enacted as part of the 1948 Act,⁹⁰ the Terminable Interest Rule ensures that transfer taxes on property passing between spouses will be deferred but not escaped.⁹¹ As the Tax Court explained in 1954:

[T]he 'terminable interest' concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from [the] gross estate with respect to the decedent, it would be adequately integrated in

83. See H.R. REP. NO. 97-201, pt. 1, at 159; see also Dodge, *supra* note 7, at 1743.

84. See H.R. REP. NO. 97-201, pt. 1, at 159.

85. See J. COMM. EXPLANATION OF ERTA, *supra* note 78, at 233-34.

86. See I.R.C. § 2056(a) (2005); Treas. Reg. § 20.2056(a)-1(a) (as amended in 1994).

87. See I.R.C. § 2056(b); Treas. Reg. § 20.2056(a)-2(a) (as amended in 1994).

88. I.R.C. § 2056(b).

89. See *id.* ("Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest - (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse."); Treas. Reg. § 20.2056(b)-1(c) (as amended in 1994).

90. Revenue Act of 1948, Pub. L. No. 80-471, § 361, 62 Stat. 110, 117 (1948); see Surrey, *supra* note 59, at 1125-26.

91. See *Hearings on H.R. 4790*, *supra* note 69, at 309 (testimony of Allan H. W. Higgins, Chairperson of the ABA Section of Taxation, Committee on Equalization of Taxes in Community-Property and Common-Law States).

the spouse's estate so that on her death it would not escape the death tax a second time.⁹²

Without the Terminable Interest Rule, an interest that qualified for the marital deduction could terminate prior to or at the surviving spouse's death, in which case it would not be included in either spouse's estate.⁹³ For example, if a decedent were allowed the marital deduction for the bequest of an income interest to a surviving spouse with the underlying property passing to his children at the surviving spouse's death, the decedent's estate would be subject to estate tax only on the value of the remainder interest passing to his children, which could be substantially less than the total value of the property.⁹⁴ On the surviving spouse's death, her life interest would terminate, nothing would be included in her estate, and a substantial portion of the original property's value would have escaped transfer taxes entirely.⁹⁵

Prior to 1981, the Terminable Interest Rule meant that transfers of life estates, life income interests, and any other term interests that could terminate prior to or at the surviving spouse's death would not qualify for the marital deduction.⁹⁶ Apart from outright dispositions, the only transfers that qualified were those that granted the surviving spouse a rough equivalent of full ownership rights⁹⁷ such that the underlying property would eventually be included in the surviving spouse's estate.⁹⁸ Examples include power of appointment trusts⁹⁹ and estate trusts.¹⁰⁰ A power of appointment trust grants the surviving spouse (i) all income from the trust payable annually or at more frequent intervals and (ii) a power to appoint trust principal that is exercisable at least in favor of the surviving spouse.¹⁰¹ This general

92. *Estate of Pipe v. Comm'r*, 23 T.C. 99, 104 (1954).

93. See Joseph M. Dodge, *Redoing the Estate and Gift Taxes Along Easy-to-Value Lines*, 43 TAX L. REV. 241, 345 (1988); Gerzog, *Adding Insult to Injury*, *supra* note 5, at 223.

94. See Gerzog, *Adding Insult to Injury*, *supra* note 5, at 223.

95. See *id.*

96. See Treas. Reg. § 20.2056(b)-1(g) exs. 1-5 (as amended in 1994); see also H.R. REP. NO. 97-201, pt. 1, at 159-60 (1981); Abrams, *supra* note 57, at 6.

97. In addition to those discussed in the text, examples include an outright bequest conditioned on survival for a limited period of time, see I.R.C. § 2056(b)(3) (2005); Treas. Reg. § 20.2056(b)-3(a) (as amended in 1958), life insurance or annuity payments with a power of appointment in the surviving spouse, see I.R.C. § 2056(b)(6); Treas. Reg. § 20.2056(b)-6(a) (as amended in 1958), and certain interests in qualified charitable remainder trusts, see I.R.C. § 2056(b)(8); Treas. Reg. § 20.2056(b)-8(a) (as amended in 1994). For a general discussion of exceptions to the Terminable Interest Rule, see Gerzog, *Adding Insult to Injury*, *supra* note 5, at 223.

98. See Gerzog, *Adding Insult to Injury*, *supra* note 5, at 223.

99. See I.R.C. § 2056(b)(5); Treas. Reg. § 20.2056(b)-5(a) (as amended in 1994).

100. See Treas. Reg. 20.2056(c)-2(b)(1)(iii) (as amended in 2004).

101. See I.R.C. § 2056(b)(5); Treas. Reg. § 20.2056(b)-5(a) (as amended in 1994).

power of appointment ensures that the property will be included in the surviving spouse's gross estate under section 2041.¹⁰² An estate trust does not necessarily grant the surviving spouse an income interest, but it provides by its terms that the remainder will pass to the surviving spouse's estate at death.¹⁰³

The legislative history to ERTA indicates that in contemplating an unlimited marital deduction, Congress became concerned that the Terminable Interest Rule would force a taxpayer to choose between maximizing tax benefits and a particular disposition of assets.¹⁰⁴ The following comment from the legislative history explains this dilemma:

[T]he enactment of an unlimited marital deduction without any change being made in the qualitative requirements for qualification would present an estate owner with a difficult choice in many cases. All estate taxes could be postponed, but only by giving the surviving spouse unrestricted control over the property, which current law requires in order to obtain a deduction. The owner may prefer not to give his or her spouse such control. The point becomes more significant as divorce and remarriage increase, which has occurred. The property owner would like to be sure that upon the death of his spouse his children by a prior marriage or marriages share in his property, including the marital deduction property . . . for the substantial property owner who must pay a tax if the marital deduction is not used the inability to satisfy each of two objectives—postponing payment of tax and being able to control the disposition of property—remains and the tax pull would be substantial to make maximum use of the deduction. A qualification test for marital deduction purposes which eliminates the general power of appointment requirement would permit satisfaction of both objectives and provide more flexibility in estate planning.¹⁰⁵

As a result of this concern, Congress enacted the QTIP Provisions at the same time that it enacted the unlimited marital deduction.¹⁰⁶ The QTIP Provisions create an exception to the Terminable Interest Rule that allows a decedent to receive the marital deduction for the full value of property in which he bequeaths his surviving spouse only a life interest.¹⁰⁷

C. The QTIP Provisions

The QTIP Provisions consist of (i) section 2056(b)(7), which allows the marital deduction for QTIP Property at the death of the first

102. See I.R.C. § 2041(b)(1).

103. See Treas. Reg. 20.2056(c)-2(b)(1)(iii) (as amended in 2004). Technically, estate trusts do not implicate the terminable interest rule because they do not involve a terminable interest. At the death of the surviving spouse, all principal and accumulated income is distributed to the surviving spouse's estate such that no property passes to a third party. See Jeffrey N. Pennell, *Estates, Gifts and Trusts Portfolios: Estate Tax Marital Deduction*, 843-2nd TAX MGMT. (BNA) V.I.E (2004).

104. See H.R. REP. NO. 97-201, pt. 1, at 159-60 (1981); 127 CONG. REC. 17289 (1981).

105. 127 CONG. REC. 17289 (statement of Sen. Steve Symms); see also H.R. REP. NO. 97-201, pt. 1, at 159-60.

106. See J. COMM. EXPLANATION OF ERTA, *supra* note 78, at 233-34.

107. See Gerzog, *Sexist QTIP Provisions*, *supra* note 11, at 100-01.

spouse to die,¹⁰⁸ and (ii) the QTIP Taxing Provisions (sections 2044 and 2519), which tax QTIP Property at the surviving spouse's death or earlier disposition of her qualifying income interest.¹⁰⁹ Section 2056(b)(7)(A) provides that QTIP Property is treated as passing to the surviving spouse for purposes of receiving the marital deduction under section 2056(a) and no part of such property is treated as passing to any person other than the surviving spouse for purposes of being disqualified from the marital deduction under section 2056(b)(1).¹¹⁰ Thus, QTIP Property is treated as passing in its entirety to the surviving spouse for purposes of qualifying for the marital deduction and for purposes of not being disqualified under the Terminable Interest Rule.¹¹¹

Section 2056(b)(7)(B) defines QTIP Property as property (i) that passes from the decedent, (ii) in which the surviving spouse receives a qualifying income interest for life, and (iii) for which an irrevocable QTIP election is made.¹¹² This definition involves three requirements. First, the property must pass from the decedent.¹¹³ This requirement is interpreted broadly to include virtually any interest acquired by the surviving spouse from the decedent spouse, be it by will, intestate succession, dower, elective share, right of survivorship, power of appointment, or life insurance beneficiary designation.¹¹⁴ Second, the surviving spouse must be given a qualifying income interest for life,¹¹⁵ meaning that she is entitled to all income for life, payable annually or at more frequent intervals,¹¹⁶ and that no person (including the surviving spouse herself) has the power to appoint the property during the surviving spouse's lifetime in favor of anyone other than the surviving spouse.¹¹⁷ The trustee may, but need not, have powers to invade trust principal for the benefit of the surviving spouse.¹¹⁸

108. See I.R.C. § 2056(b)(7)(A) (2005); Treas. Reg. § 20.2056(b)-7(a) (as amended in 2004).

109. See I.R.C. § 2044; Treas. Reg. § 20.2044-1(a) (as amended in 1998); see also I.R.C. § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003). For a general overview of the QTIP Provisions, see Pennell, *supra* note 103, at VI.F.

110. See I.R.C. § 2056(b)(7)(A); Treas. Reg. § 20.2056(b)-7(a) (as amended in 2004).

111. See I.R.C. § 2056(b)(7)(A) ("In the case of qualified terminable interest property - (i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and (ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse."); see also H.R. REP. NO. 97-201, pt. 1, at 161 (1981).

112. See I.R.C. § 2056(b)(7)(B)(i); Treas. Reg. § 20.2056(b)-7 (as amended in 2004).

113. See I.R.C. § 2056(b)(7)(B)(i)(I).

114. See *id.* § 2056(c); Treas. Reg. §§ 20.2056(c)-1(a), -2(a) (as amended in 1994).

115. See I.R.C. § 2056(b)(7)(B)(i)(II); Treas. Reg. § 20.2056(b)-7(d) (as amended in 2004).

116. See I.R.C. § 2056(b)(7)(B)(ii)(I).

117. See *id.* § 2056(b)(7)(B)(ii)(II).

118. See Pennell, *supra* note 103, at VI.F.2.d.

As a final requirement, an irrevocable election must be made to treat the property as QTIP Property.¹¹⁹ This election, made by the decedent spouse's executor on an estate tax return (or, in the case of an *inter vivos* QTIP trust, by the donor on a gift tax return),¹²⁰ ensures that the property will be subject to transfer taxes under the QTIP Taxing Provisions at the surviving spouse's death or earlier lifetime disposition of part or all of her qualifying income interest.¹²¹ If the surviving spouse dies holding the qualifying income interest, section 2044 will apply, providing that the value of the surviving spouse's gross estate includes the value of any property in which she had a qualified income interest for life and for which a marital deduction was allowed under section 2056(b)(7).¹²² If the surviving spouse disposes of part or all of her qualifying income interest during her life, section 2519 will apply, providing that any such disposition is treated as a transfer of all interests in the QTIP Property other than the qualifying income interest.¹²³ As will be discussed in more detail in Part VI,¹²⁴ the QTIP Taxing Provisions have also been extended by the Service, problematically, to a remainderman's transfer of a QTIP remainder interest.¹²⁵ By the terms of these provisions, however, they apply only to a termination or transfer of the surviving spouse's qualifying income interest.¹²⁶

The QTIP Provisions appear to contradict the reasoning behind the Terminable Interest Rule by granting a marital deduction for a terminable interest. At the surviving spouse's death, her qualifying income interest will terminate and the remainder will pass to the remainderman, a third party who will "possess and enjoy" the QTIP Property in violation of the Terminable Interest Rule.¹²⁷ This apparent contradiction cannot be explained by analogizing QTIP Property to either of the exceptions mentioned above.¹²⁸ The surviving spouse is not given any control over the ultimate disposition of the property, so it cannot be compared to a power of appointment trust.¹²⁹ The QTIP Property will not pass to the surviving spouse's estate at her death, so it cannot be compared with an estate trust.¹³⁰ The apparent contradiction can,

119. See I.R.C. § 2056(b)(7)(B)(i)(III); Treas. Reg. § 20.2056(b)-7(b)(3), (b)(4) (as amended in 2004).

120. See J. COMM. EXPLANATION OF ERTA, *supra* note 78, at 233–34.

121. See *id.*

122. See I.R.C. § 2044; Treas. Reg. § 20.2044-1(a) (as amended in 1998).

123. See I.R.C. § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

124. See *infra* text accompanying notes 198–248.

125. See Rev. Rul. 98-8, 1998-7 C.B. 24.

126. See I.R.C. §§ 2044, 2519.

127. See *id.* § 2056(b)(1)(B); Treas. Reg. § 20-2056(b)-1(c)(1)(ii) (as amended in 1994).

128. See *supra* text accompanying notes 99–103.

129. See *supra* text accompanying notes 101–02.

130. See *supra* text accompanying note 103.

however, be explained by means of the Ownership Fiction, as explained in Part IV.

IV. THE OWNERSHIP FICTION

Fuller states that a legal fiction's primary utility lies in its ability to reconcile a specific legal result with a pre-existing principle of law.¹³¹ The Ownership Fiction performs this function by reconciling the decision to qualify QTIP Property for the marital deduction with the Terminable Interest Rule. In so doing, it turns the QTIP Provisions' apparent contradiction of this rule into a permissible exception. This Part demonstrates how the Ownership Fiction's falsity leads to this utility, while also creating the potential for misuse. This is a necessary first step in "removing the scaffolding" of the Ownership Fiction to understand its role in the taxation of QTIP Property.

A. The Ownership Fiction's Falsity and Utility

The Ownership Fiction is clearly a falsehood, treating a surviving spouse as owning QTIP Property outright when she owns nothing more than a life interest. But like all legal fictions, it is neither an incorrect conclusion nor a lie. It is not an incorrect conclusion because Congress was well aware that QTIP Property would not actually pass to the surviving spouse.¹³² Rather, its stated intent in enacting the QTIP Provisions was to create an exception to the Terminable Interest Rule for a situation where it would not pass to her.¹³³ Additionally, the Ownership Fiction is not a lie because Congress never intended for anyone else to believe it. To the contrary, Congress sought to reassure taxpayers that they would no longer have to choose between maximizing tax benefits and a certain disposition of assets.¹³⁴

The Ownership Fiction's falsity is based on the analogy that the ownership arrangement of QTIP Property is more similar to the surviving spouse owning the property outright than it is to anyone else owning any interest in it. This analogy expresses a truth regarding the relationship between QTIP Property and the marital unit: that estate taxes were deferred on the death of the first spouse to die such that the property has not yet been treated as leaving the marital unit for transfer tax purposes. Based on this truth, the analogy persuasively characterizes the QTIP Property as being owned by the surviving spouse, who is the sole representative of the unit after the death of the first spouse to die.

131. See Fuller, *Fictions II*, *supra* note 1, at 514.

132. See *supra* text accompanying notes 104-06.

133. See H.R. REP. NO. 97-201, pt. 1, at 159 (1981); 127 CONG. REC. 17289 (1981).

134. See H.R. REP. NO. 97-201, pt. 1, at 159; 127 CONG. REC. 17289.

The Ownership Fiction's persuasiveness is challenged by the premium that the gift and estate taxes place on the ownership right of control.¹³⁵ The gift and estate tax analysis of any given transaction does not always coincide with a property law analysis, but the gift and estate taxes rarely disregard the ownership right of control.¹³⁶ The presence or absence of this right generally determines the time and extent of a gift under federal gift tax law,¹³⁷ and whether or not an interest is included in a decedent's taxable estate under federal estate tax law.¹³⁸ Here, the surviving spouse has no control over the QTIP remainder interest but is still treated as owning all interests in the QTIP Property for purposes of inclusion in her transfer tax base. Viewed in terms of the marital unit, the Ownership Fiction remains persuasive despite this challenge. Because one member of the unit (the decedent spouse) exercises control over the QTIP Property, the unit as a whole is deemed to exercise this ownership right. As discussed below, however, this deemed exercise of control has significance only for purposes of inclusion in the surviving spouse's transfer tax base.

The Ownership Fiction's analogy, false on its face yet capable of expressing a truth, leads to its utility. By comparing QTIP Property to property bequeathed outright to a surviving spouse, it allows the Ownership Fiction to bring QTIP Property within the scope of tax laws that operate on outright bequests. These laws (i) allow a marital deduction for property passing to a surviving spouse¹³⁹ and (ii) subsequently include that property in the surviving spouse's transfer tax base.¹⁴⁰ Bringing QTIP Property within the scope of these laws justifies the marital deduction by ensuring that transfer taxes will not be escaped and that the danger contemplated by the Terminable Interest Rule will not be encountered.

The utility just described is dependent upon the QTIP Taxing Provisions sustaining the Ownership Fiction for purposes of, but only for purposes of, balancing the initial marital deduction with a later tax. If the QTIP Property is treated as owned by anyone else in this context, it may escape transfer taxes and the Ownership Fiction will no longer justify the initial deduction. If the QTIP Property is treated as owned

135. See Gerzog, *Sexist QTIP Provisions*, *supra* note 11, at 106–07.

136. See *id.*

137. See Treas. Reg. § 25.2511-2 (as amended in 1999) (“As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete.”).

138. See I.R.C. §§ 2036–38, 2041(a)(2) (2005); see also Gerzog, *Sexist QTIP Provisions*, *supra* note 11, at 106–07 (“Control is often the main characteristic of ownership to determine . . . inclusion in the decedent's estate.”).

139. See I.R.C. § 2056(a); Treas. Reg. § 20.2056(a)-1(a) (as amended in 1994).

140. See I.R.C. § 2033.

by the surviving spouse in any other context, it will no longer express a truth about the connection between QTIP Property and the marital unit and will lead to the danger of which Fuller warns.¹⁴¹

B. The Ownership Fiction's Potential Dangers

As with all legal fictions, the danger of the Ownership Fiction is that it will facilitate unjust results.¹⁴² This danger will arise if the Ownership Fiction is used in a situation in which it does not express a fundamental truth regarding the connection between QTIP Property and the marital unit. Two such situations involve the property law and economic realities of QTIP Property.

Property law generally defines "ownership" as a collection of rights that may be exercised with respect to property, including the rights to possess, to use, to enjoy, to control, and to alienate such property.¹⁴³ With respect to QTIP Property, these rights of ownership are split between the surviving spouse and one or more remaindermen. Generally, the surviving spouse is entitled to the income, use, and enjoyment of the QTIP Property during her life, but has no rights with respect to the QTIP remainder interest. The remainderman has no current rights of possession, use, or enjoyment, but is entitled to the remainder of the QTIP Property after the surviving spouse's qualifying income interest has terminated.¹⁴⁴ Therefore, the surviving spouse's deemed ownership of the QTIP remainder interest has no meaning with respect to the property law ownership of this interest.

Her deemed ownership of QTIP Property has no meaning for economic purposes either. This lack of meaning was recognized by the Fifth Circuit Court of Appeals in *Estate of Bonner v. United States*.¹⁴⁵ In *Bonner*, ownership interests in a piece of real property were divided between a decedent and a QTIP trust for the decedent's lifetime benefit.¹⁴⁶ The decedent's executor used a forty-five percent fractional interest discount in valuing the interests held outright separately from those held by the trust, despite the fact that all such interests were included in the decedent's estate (those held outright under section 2033¹⁴⁷ and those held in the QTIP trust under section 2044).¹⁴⁸ The court upheld the fractional interest discount because "[t]he [QTIP] assets, although taxed as if they passed through [the decedent's] estate,

141. See *supra* text accompanying notes 43–51.

142. See *supra* text accompanying notes 43–51.

143. See 63C AM. JUR. 2D *Property* §§ 26–27 (2005); Kenneth Campbell, *On the General Nature of Property Rights*, 3 KING'S C. L. J. 79, 89–91 (1992).

144. See BLACK'S LAW DICTIONARY 780, 945, 1317–18 (8th ed. 2004).

145. 84 F.3d 196 (5th Cir. 1996).

146. See *id.* at 197.

147. I.R.C. § 2033 (2005).

148. See *Bonner*, 84 F.3d at 197.

in fact were controlled at every step by [the decedent's spouse], which a tax valuation with a fractional interest discount would reflect."¹⁴⁹ Thus, the court treated the decedent as owning the interests for purposes of estate inclusion but not for purposes of valuation.

In *Estate of Mellinger v. Commissioner*,¹⁵⁰ the Tax Court similarly held that stock held outright by a surviving spouse and stock held for her benefit in a QTIP trust should not be aggregated for valuation purposes.¹⁵¹ The court observed that the decedent did not, at any time, possess, control, or have any power of disposition over the stock in the QTIP trust.¹⁵² Further, neither section 2044 nor the relevant legislative history indicated that the decedent should be treated as the owner for all purposes. "Section 2044 was designed to prevent QTIP property from escaping taxation by including it in the estate of the second spouse to die. There is, however, no indication that Section 2044 mandated identical tax consequences as an outright transfer to a surviving spouse."¹⁵³

In concluding that the surviving spouse should not be treated as owning QTIP Property for valuation purposes, the courts in both cases recognized that a surviving spouse's deemed ownership of QTIP Property has no economic meaning. It has meaning only for purposes of balancing the initial marital deduction with a subsequent transfer tax before the QTIP Property leaves the marital unit. Using the Ownership Fiction for any other purpose will lead to the fiction's danger: the inequitable results of holding a surviving spouse responsible for ownership of property with respect to which she has no economic or property law rights. The remainder of this Article analyzes the QTIP Taxing Provisions and the QTIP Rulings to determine when this danger of the Ownership Fiction is avoided, as it was in *Bonner* and *Mellinger*, and when it becomes manifest.

V. THE QTIP TAXING PROVISIONS

The QTIP Taxing Provisions tax QTIP Property at the earlier to occur of the surviving spouse's (i) death¹⁵⁴ or (ii) lifetime disposition of part or all of her qualifying income interest.¹⁵⁵ In both of these situations, the Ownership Fiction expresses the truth that for transfer tax purposes, QTIP Property has not yet been treated as leaving the mari-

149. *Id.* at 199.

150. 112 T.C. 26 (1999); see also *Bonner*, 84 F.3d 196; Terry S. Jones, *Estate of Bonner v. United States: QTIPs and Fractional Interest Discounts: Whipsaw Wonderland*, 33 IDAHO L. REV. 595 (1997).

151. See *Mellinger*, 112 T.C. at 37.

152. See *id.* at 36.

153. *Id.* at 37.

154. See I.R.C. § 2044 (2005); Treas. Reg. § 20.2044-1(a) (as amended in 1998).

155. See I.R.C. § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

tal unit. In both of these situations, the QTIP Taxing Provisions' response is consistently based in the Ownership Fiction. In the first situation, section 2044 includes the value of the QTIP Property in the surviving spouse's estate,¹⁵⁶ just as if she had owned it outright during her life. In the second situation, section 2519 taxes the entire QTIP remainder interest as soon as the surviving spouse disposes of any portion of her qualifying income interest.¹⁵⁷ Initially, section 2519 does not appear to treat the surviving spouse as she would be treated had she owned the QTIP Property outright, but a closer analysis proves otherwise. In both cases, the QTIP Taxing Provisions produce equitable results.

A. Section 2044: Taxing QTIP Property at the Surviving Spouse's Death

Section 2044 applies to the typical scenario involving QTIP Property: a spouse bequeaths QTIP Property to his surviving spouse for life and provides that at her death, the property will pass to his children or other third party remainderman. Both the surviving spouse and the children hold their respective QTIP interests until the surviving spouse's death, at which time section 2044 includes the value of the QTIP Property in the surviving spouse's gross estate.¹⁵⁸ In so doing, section 2044 treats the surviving spouse as if she had received outright ownership of the underlying QTIP Property and held that property for life.¹⁵⁹

For example, assume that pursuant to a decedent's will, QTIP Property valued at \$200,000 passes to a surviving spouse for life. The surviving spouse holds her qualifying income interest until her death ten years later when the value of the underlying property is \$300,000. This value (\$300,000) will be included in her gross estate under section 2044.¹⁶⁰ To the extent not consumed during her life, the income from such property, along with any principal distributions that she receives, will be included in her gross estate as property that she owns outright (under section 2033).¹⁶¹ This is the same result as if property worth \$200,000 had passed outright to the surviving spouse under the decedent spouse's will. To the extent not consumed during life, the property, along with any appreciation thereon and any income therefrom, would be included in her gross estate under section 2033.¹⁶²

156. See I.R.C. § 2044.

157. See *id.* § 2519.

158. See *id.* § 2044; Treas. Reg. § 20.2044-1(a) (as amended in 1998).

159. See I.R.C. § 2033.

160. See Treas. Reg. § 20.2044-1(e) ex. 1 (as amended in 1998); H.R. REP. NO. 97-201, pt. 1, at 159 (1981).

161. See H.R. REP. NO. 97-201, pt. 1, at 159.

162. I.R.C. § 2033.

A surviving spouse's receipt of a qualifying income interest followed by the remainderman's receipt of the QTIP remainder interest at the surviving spouse's death is substantially the same, in effect, as a surviving spouse's receipt of the underlying QTIP Property followed by her bequest of such property to the remainderman. It is therefore equitable to treat the two situations alike for purposes of balancing the initial marital deduction with a later transfer tax. Section 2044 does just that, balancing the initial marital deduction, granted as if the QTIP Property had passed outright to the surviving spouse, with an estate tax, applied as if the property had so passed.

B. Section 2519: Taxing QTIP Property at the Earlier Transfer of a Qualifying Income Interest

Section 2519 applies to a less typical scenario involving QTIP Property, in which a surviving spouse transfers part or all of her qualifying income interest during her life. Section 2519 provides that any such disposition is deemed to be a transfer of all interests in the property other than the income interest.¹⁶³ The regulations and legislative history interpret the term "disposition" broadly to include any circumstance in which the surviving spouse's right to receive income is relinquished or terminated, by whatever means.¹⁶⁴ The surviving spouse is also treated as making a gift under section 2511¹⁶⁵ in the amount of the transferred income interest, less any consideration received in return.¹⁶⁶

Initially, section 2519 does not appear to be based on the Ownership Fiction. If a surviving spouse were treated as if she owned the QTIP Property outright, one would expect that her disposition of a portion of her qualifying income interest would have no bearing on the QTIP remainder interest. At the very least, one would expect that her qualifying income interest would be treated as a proxy for the underlying property, such that her transfer of a portion of the qualifying income interest would be deemed a transfer of a corresponding portion of the underlying QTIP Property.

A closer analysis reveals that like section 2044, section 2519 treats a surviving spouse just as she would be treated if she owned the QTIP Property outright. The key to understanding this result is the special

163. See *id.* § 2519; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

164. See H.R. REP. NO. 97-201, pt. 1, at 161 (providing that property subject to a QTIP election will be subject to transfer taxes at the earlier to occur of (i) the date on which the spouse disposes (either by gift, sale or otherwise) of all or part of the qualifying income interest, or (ii) upon the spouse's death).

165. See Treas. Reg. § 25.2519-1(a) (as amended in 2003).

166. See I.R.C. § 2511; Treas. Reg. § 25.2519-1(a) (as amended in 2003).

valuation rule of section 2702.¹⁶⁷ Designed to prevent taxpayers from undervaluing gifts for gift tax purposes,¹⁶⁸ this rule provides that when a donor makes a transfer in trust¹⁶⁹ to or for the benefit of a member of the donor's family,¹⁷⁰ any interest¹⁷¹ in the trust (other than a qualified interest)¹⁷² retained¹⁷³ by the donor or an applicable family member¹⁷⁴ is valued at zero for purposes of determining the amount of such gift.¹⁷⁵ Since the value of the transferred interest is determined by subtracting the value of the retained interest from the value of the underlying property, this produces a correspondingly high gift tax value for the transferred interest.¹⁷⁶

As a result of section 2702's valuation rule, if a surviving spouse is bequeathed property outright and subsequently transfers an income interest therein to a family member, she will be treated as making a transfer in trust while retaining an interest that is not a qualified interest.¹⁷⁷ Her retained interest will be valued at zero and the gift tax

167. I.R.C. § 2702(a). See Treas. Reg. § 25.2702-1 (as amended in 1998). For an overview of section 2702, see Jonathan G. Blattmachr, *Estates, Gifts and Trusts Portfolios: Partial Interests—GRATS, GRUTS, QPRTS (Section 2702)*, 836-1st TAX MGMT. (BNA) II (2004); Paul Hood, Jr., *Estates, Gifts and Trusts Portfolios: Valuation*, 830-2nd TAX MGMT. (BNA) IV (2005); Adena W. Testa, *Estates, Gifts and Trusts Portfolios: Chapter 14*, 835-2nd TAX MGMT. (BNA) V (2004).

168. See Grayson M. P. McCouch, *Rethinking Section 2702*, 2 FLA. TAX REV. 99 (1994).

169. See Treas. Reg. § 25.2702-2(a)(2) (as amended in 1992) ("A transfer in trust includes a transfer to a new or existing trust and an assignment of an interest in an existing trust.").

170. See Treas. Reg. § 25.2702-2(a)(1) (as amended in 1992) ("With respect to any individual, member of the family means the individual's spouse, any ancestor or lineal descendant of the individual or the individual's spouse, any brother or sister of the individual, and any spouse of the foregoing.").

171. See Treas. Reg. § 25.2702-2(a)(4) (as amended in 1992) ("An interest in trust includes a power with respect to a trust if the existence of the power would cause any portion of a transfer to be treated as an incomplete gift under chapter 12.").

172. See I.R.C. § 2702(b) (defining qualified interest as (i) the right to receive a fixed amount payable at least annually (an annuity interest); (ii) the right to receive a fixed percentage of the annual fair market value of the trust property at least annually (a unitrust interest); or (iii) a noncontingent remainder if all of the other interests are qualified annuity or unitrust interests); Treas. Reg. § 25.2702-2(a)(5), (6), (7), (8) (as amended in 1992).

173. See Treas. Reg. § 25.2702-2(a)(3) (as amended in 1992) ("Retained means held by the same individual both before and after the transfer in trust. In the case of the creation of a term interest, any interest in the property held by the transferor immediately after the transfer is treated as held both before and after the transfer.").

174. See Treas. Reg. § 25.2702-1(a) (as amended in 1998) (defining applicable family member as provided in Treasury Regulation Section 25.2701-1(d)(2): "an applicable family member is, with respect to any transferor - (i) [t]he transferor's spouse; (ii) [a]ny ancestor of the transferor or the transferor's spouse; and (iii) [t]he spouse of any such ancestor").

175. See I.R.C. § 2702(a); Treas. Reg. § 25.2702-1(a) (as amended in 1998).

176. See Treas. Reg. § 25.2702-1(b) (as amended in 1998).

177. See I.R.C. § 2702(a); Treas. Reg. § 25.2702-1 (as amended in 1998).

value of the transferred interest will be the full value of the underlying QTIP Property.¹⁷⁸ Section 2519 leads to the same result. If a surviving spouse transfers any part or all of her qualifying income interest, she will be treated as making a gift of (i) all interests in the property other than the income interest under section 2519 and (ii) the transferred income interest under section 2511.¹⁷⁹ If she transfers only a part of her income interest, she will also be treated under section 2702 as making a transfer in trust of a portion of her qualifying income interest while retaining a portion that is not a qualified interest.¹⁸⁰ The retained portion will be valued at zero and the value of the section 2511 gift will be the full value of the income interest. The total gift will be the full value of the underlying QTIP Property, just as if the surviving spouse had received the QTIP Property outright and subsequently gifted a partial interest.¹⁸¹

An example illustrates that section 2519 treats QTIP Property exactly as it would be treated if it were owned outright by the surviving spouse. Assume that a surviving spouse holds a qualifying income interest with an actuarial value of \$100,000 in QTIP Property that has a value of \$300,000. Assume further that the surviving spouse makes a gift of ten percent of her qualifying income interest. Under section 2519, she will be treated as making a gift of the value of the QTIP Property less the actuarial value of her qualifying income interest (\$300,000 - \$100,000 = \$200,000). Under section 2511, she also will be treated as making a gift of the fair market value of the transferred portion of her income interest (10% of \$100,000 = \$10,000).¹⁸² Under section 2702, her ninety percent retained income interest will be valued at zero, thereby increasing the value of her gift under section 2511 to \$100,000.¹⁸³ Her total gift will be \$300,000, reduced by any consideration that she receives in exchange.¹⁸⁴ This is the same result as if the surviving spouse received the QTIP Property outright and subsequently made a gift of ten percent of the income therefrom. Under section 2702, the surviving spouse would be treated as making a transfer in trust of an income interest that was not a qualified interest, while retaining an interest. The retained interest would be valued at zero and the value of the transferred interest would be the full value of the underlying property (\$300,000).¹⁸⁵

178. See I.R.C. § 2702(a); Treas. Reg. § 25.2702-1 (as amended in 1998).

179. See I.R.C. § 2519; Treas. Reg. § 25.2519-1 (as amended in 2003).

180. See Treas. Reg. § 25.2519-1(g) exs. 4, 5 (as amended in 2003).

181. See *supra* text accompanying note 178.

182. See Treas. Reg. § 25.2519-1(g) ex. 1 (as amended in 2003).

183. See Treas. Reg. § 25.2519-1(a) (as amended in 2003); see also I.R.C. § 2702; Treas. Reg. § 25.2519-1(g) ex. 4, 5 (as amended in 2003).

184. For the effect of receiving consideration and thereby reducing the value of the section 2511 gift, see Treas. Reg. § 25.2519-1(g) ex. 2 (as amended in 2003).

185. See I.R.C. § 2702(a); Treas. Reg. § 25.2702-1 (as amended in 1998).

There are two ways in which section 2519's treatment of QTIP Property differs from section 2702's treatment of property held outright. First, section 2702 distinguishes between gifts to family members and gifts to non-family members,¹⁸⁶ while section 2519 does not. Second, section 2702 allows a taxpayer to designate a portion of property with respect to which a transfer will be made, in which case the special valuation rules apply only to that portion. Section 2519 does not.

With respect to the first distinction, section 2519 does not distinguish between family members and non-family members because, as a practical matter, there is no need to. Generally, a surviving spouse's transfer of a qualifying income interest will be as part of an estate planning transaction to transfer wealth to lower generations within a family.¹⁸⁷ As a result, section 2519 will generally apply only to intrafamily transfers.

The second distinction exists in the legislative history, but not in practice. Section 2702's history indicates that a donor can designate a portion of a trust from which an income interest is transferred. Section 2702 will then apply only to that percentage of the trust.¹⁸⁸ Neither the legislative history nor the regulations to section 2519 explicitly allow a surviving spouse to do the equivalent: designate a portion of QTIP Property from which an interest will be transferred such that section 2519 applies only to that portion. Several private letter rulings have allowed this, however.¹⁸⁹ Each of the rulings addresses some variation on the same fact pattern,¹⁹⁰ in which a surviving spouse divides a trust holding QTIP Property into two or more separate trusts and disposes of her qualifying income interest in one such trust. The rulings hold that section 2519 applies only to the trust from which the qualifying income interest is transferred. The portion of the QTIP remainder interest treated as transferred is therefore proportionate to the transferred portion of the income interest.¹⁹¹ The rul-

186. See I.R.C. § 2702(a); Treas. Reg. § 25.2702-1(a) (as amended in 1998).

187. See, e.g., Lawrence M. Lipoff, *Revisiting Purchases of Remainder Interests in QTIP Trusts*, 27 EST. PLAN. 114 (2000) [hereinafter Lipoff, *Remainder Interests*]; Lawrence M. Lipoff, *Estates and Trusts, Revenue Ruling 98-8: Purchases of QTIP Remainder Interests*, CPA J., July 1998, at 58.

188. The legislative history asserts that "for a transfer with respect to a specified portion of property, Section 2702 applies only to such portion." J. COMM. ON TAXATION, DESCRIPTION OF TAX PROVISIONS OF H.R. 1555 AND S. 750 (TITLE I OF THE TECHNICAL CORRECTIONS ACT OF 1991), at 13-18 (Comm. Print 1991); see also CONFERENCE REPORT ON H.R. 11, 102nd Cong. 2nd Sess., pt. 16 (1992).

189. See, e.g., I.R.S. Priv. Ltr. Rul. 2003-24-023 (Feb. 26, 2003); I.R.S. Priv. Ltr. Rul. 2003-19-002 (Jan. 13, 2003); I.R.S. Priv. Ltr. Rul. 2002-50-033 (Sept. 10, 2002); I.R.S. Priv. Ltr. Rul. 2001-37-022 (June 13, 2001); I.R.S. Priv. Ltr. Rul. 2000-44-034 (Aug. 8, 2000); I.R.S. Priv. Ltr. Rul. 99-26-019 (Mar. 30, 1999).

190. See, e.g., I.R.S. Priv. Ltr. Rul. 99-26-019 (Mar. 30, 1999).

191. See *id.*

ings further hold that section 2702 will not treat an interest in any other separate trust as a retained interest in valuing the gift.¹⁹²

Despite the two distinctions, section 2519, like section 2044, is consistently based on the Ownership Fiction, treating a surviving spouse just as she would be treated if she owned QTIP Property outright. However, asserting that the QTIP Taxing Provisions are consistently based on the Ownership Fiction does not mean that they blindly follow the fiction in all situations. The legislative history¹⁹³ provides the following example of a situation, involving an *inter vivos* transfer of QTIP Property, in which the Ownership Fiction is dropped because it no longer serves as a metaphor for a truth:

[W]here the donor-spouse retains an interest or power in the qualified terminable interest property and the donor subsequently transfers the power or interest prior to the deemed transfer by the donee-spouse under sections 2044 or 2519, the transfer might be subject to gift tax. Similarly, where the donor-spouse retained an interest or power in the qualified terminable interest property until his death, all or a portion of the qualified terminable interest property might be includible in his gross estate. The donor-spouse or his estate would be so taxable even though the qualified terminable interest property also would be treated as transfer[red] . . . under sections 2044 or 2519. In order to preclude this result, the Congress intends that any retained interest or power which the donor-spouse transfers, or dies owning, prior to a deemed transfer by the donee-spouse under sections 2044 or 2519 should not be treated as a gift or be included in the donee-spouse's gross estate.¹⁹⁴

The truth usually expressed by the Ownership Fiction (that treating the surviving spouse as owning QTIP Property will equitably balance the earlier deduction with a subsequent tax) is entirely untrue in this situation. To the contrary, treating the surviving spouse as owning the QTIP Property would lead to the inequitable result of including such property in the transfer tax bases of both spouses. To avoid this result, the legislative history indicates that the Ownership Fiction will be dropped.¹⁹⁵

This Part has demonstrated that the QTIP Taxing Provisions are consistently based on the Ownership Fiction, treating a surviving spouse just as she would be treated if she owned the QTIP Property outright. But they do not blindly follow the fiction if doing so would lead to inequitable results. Together, along with section 2056(b)(7), they create an equitable taxing regime, taking advantage of the Ownership Fiction's utility while avoiding its dangers. A surviving spouse is granted the benefits of outright ownership at the death of the first spouse to die. She is later held responsible for the corresponding detriment of outright ownership, but for no further detriment.

192. See *id.*

193. J. COMM. EXPLANATION OF ERTA, *supra* note 78, at 231-40.

194. *Id.* at 237.

195. See *id.*

VI. THE QTIP RULINGS

Part V demonstrated that when applied by their terms, the QTIP Taxing Provisions are consistently based in the Ownership Fiction. Because they address situations in which the Ownership Fiction expresses a truth regarding the connection between QTIP Property and the marital unit, they lead to equitable results. This Part addresses a situation in which the Ownership Fiction expresses no such truth and to which the QTIP Taxing Provisions do not apply by their terms: the disposition of a QTIP remainder interest. Through the QTIP Rulings, the Service has treated this disposition inconsistently, relying upon the Ownership Fiction where the transaction is structured as a sale,¹⁹⁶ and dropping it where it is structured as a gift.¹⁹⁷ The following discussion of these rulings demonstrates how this has led to inconsistent and inequitable results.

A. Taxing QTIP Property at the Transfer of a Remainder Interest

1. *Sale of a QTIP Remainder Interest*

In Revenue Ruling 98-8¹⁹⁸ ("Rev. Rul. 98-8"), the Service ruled that when a surviving spouse purchases a QTIP remainder interest from the named remainderman for a promissory note in the amount of the QTIP remainder interest, she makes a gift under section 2519 in the amount of the value of the remainder interest.¹⁹⁹ Under the facts of the ruling, assets worth \$X plus \$Y passed under a decedent's will to a QTIP trust for his surviving spouse's lifetime benefit with the remainder passing to his child on the spouse's death. The surviving spouse, the child, and the trustee of the QTIP trust agreed to the following arrangement: (i) the surviving spouse would purchase the child's QTIP remainder interest for promissory notes in the face amount of the actuarial value of the QTIP remainder interest (\$X); (ii) the trustee would distribute the QTIP assets (having a value of \$X plus \$Y) to the surviving spouse; and (iii) the surviving spouse would pay \$X to the child in satisfaction of the promissory note. The surviving spouse contended that the receipt of the QTIP remainder interest constituted full and adequate consideration for the promissory note and that the transfer did not constitute a gift. The Service disagreed.²⁰⁰

196. See Rev. Rul. 98-8, 1998-1 C.B. 541.

197. See I.R.S. Priv. Ltr. Rul. 99-08-033 (Nov. 30, 1998).

198. See Rev. Rul. 98-8, 1998-1 C.B. 541. The issue presented in Rev. Rul. 98-8 was first raised by a taxpayer and settled with the Service in *Estate of Olsten*, No. 22277-95, 1996 CTF 3-33 (Jan. 17, 1996). The Service issued Rev. Rul. 98-8 to prevent similar transactions. For a general discussion and critique of Rev. Rul. 98-8, see Lipoff, *Remainder Interests*, *supra* note 187, at 115.

199. See Rev. Rul. 98-8, 1998-1 C.B. 541.

200. See *id.*

Under two different arguments, the Service concluded that the surviving spouse made a taxable gift in the amount of the QTIP remainder interest.²⁰¹ Under the first, the Service characterized the transaction as a commutation of the surviving spouse's income interest and argued that a commutation was a taxable disposition of the surviving spouse's qualifying income interest, resulting in a gift under section 2519 of the value of the QTIP remainder interest.²⁰² A commutation is a division of trust property between one or more life beneficiaries and one or more remaindermen based on the proportionate values of their interests.²⁰³ The Service claimed that this accurately characterized the transaction at issue—a transaction which left the surviving spouse with assets equaling the actuarial value of her qualifying income interest (\$Y) and the child with assets equaling the actuarial value of the QTIP remainder interest (\$X).

The Service then claimed that there was little distinction between this commutation and the examples of sales and commutations in the regulations and legislative history that are explicitly characterized as dispositions.²⁰⁴ In all cases, the surviving spouse's interest in a QTIP trust terminates, leaving her with outright ownership of an amount of property equal to the actuarial value of her income interest. The Service concluded that the surviving spouse should be treated just as she was in the regulations and legislative history: as having made a disposition of her qualifying income interest under section 2519.²⁰⁵

Even if the transaction could not be characterized as a commutation, the Service argued that the surviving spouse had made a gift under a second argument. Specifically, the surviving spouse had not received fair and adequate consideration²⁰⁶ for her transfer of the promissory notes and had therefore made a gift in their face amount.²⁰⁷ After noting that the surviving spouse had transferred a valuable asset (the promissory notes) in exchange for an asset already included in her transfer tax base under section 2044 (the QTIP re-

201. For more comprehensive treatment of each argument, see I.R.S. Field Serv. Adv. 1996 WL 33320998 (Apr. 24, 1996).

202. See Rev. Rul. 98-8, 1998-1 C.B. 541.

203. *Id.*; see also *Estate of Novotny v. Comm'r*, 93 T.C. 12 (1989) (indicating that commutation by surviving spouse and remainderman constituted a disposition by spouse of income interest for the purposes of section 2519).

204. See Rev. Rul. 98-8, 1998-1 C.B. 541 ("[Treas. Reg.] § 25.2519-1(g), Example (2) (illustrating that the sale by the spouse of the spouse's income interest to the trust remaindermen is a disposition of the income interest); § 25.2519-1(f) providing that '[T]he sale of qualified terminable interest property, followed by the payment to the donee-spouse of a portion of the proceeds equal to the value of the donee-spouse's income interest, is considered a disposition of the qualifying income interest.'").

205. See *id.*

206. See I.R.C. § 2512(b) (2005); Treas. Reg. § 25.2512-8 (as amended in 1992).

207. See Rev. Rul. 98-8, 1998-1 C.B. 541.

mainder interest), the Service concluded that "receipt of an asset that does not effectively increase the value of the recipient's [potential] gross estate does not constitute adequate consideration for purposes of the gift and estate tax."²⁰⁸

The Service supported this argument with *Commissioner v. Wemyss*,²⁰⁹ a 1945 case holding that the "[t]he section taxing as gifts transfers that are not made for 'adequate and full [money] consideration' aims to reach those transfers which are withdrawn from the donor's estate."²¹⁰ The Service cited two other 1940s cases²¹¹ for the proposition that a husband's transfer of property to his fiancée in exchange for her relinquishment of marital rights is not made for adequate and full consideration because the assets subject to marital rights are already included in his taxable estate.²¹² The Service stated that the case at hand was analogous since the surviving spouse had transferred property to the child in exchange for something that had no effect on the value of her gross estate.²¹³ The ruling concludes by stating that the result under either argument would be the same had the spouse transferred cash rather than promissory notes.

2. *Gift of a QTIP Remainder Interest*

In Private Letter Ruling 99-08-033²¹⁴ ("PLR '033"), a taxpayer responded to Rev. Rul. 98-8 by arguing that if the sale of a QTIP remainder interest to a surviving spouse for its fair market value constitutes a gift from the surviving spouse in the amount of that value, no gift tax should be due if the transaction is altered so that the surviving spouse does not transfer value to the remainderman. In other words, a remainderman's gratuitous transfer of a QTIP remainder interest to a surviving spouse should not constitute a gift because, pursuant to the reasoning of Rev. Rul. 98-8, the QTIP remainder interest is either accorded a value of zero when received by the surviving spouse or is treated as already owned by the surviving spouse. The Service rejected this rationale.²¹⁵

Under the facts of PLR '033, a surviving spouse held a qualifying income interest in a QTIP trust established by her decedent spouse. At her death, trust principal was to pass to a remainder trust for the benefit of the children of the decedent spouse and surviving spouse.

208. *Id.*

209. 324 U.S. 303 (1945).

210. *Id.* at 307 (second alteration in original).

211. See *Merrill v. Fahs*, 324 U.S. 308 (1945); *Comm'r v. Bristol*, 121 F.2d 129 (1941).

212. See *Merrill*, 324 U.S. at 311-12; *Bristol*, 121 F.2d at 136; Rev. Rul. 98-8, 1998-1 C.B. 541.

213. See Rev. Rul. 98-8, 1998-1 C.B. 541.

214. See I.R.S. Priv. Ltr. Rul. 99-08-033 (Nov. 30, 1998).

215. See *id.*

The children, the surviving spouse, and the trustees of both the QTIP trust and the remainder trust proposed to terminate the QTIP trust and distribute the trust corpus to the surviving spouse.²¹⁶ The taxpayer (one of the children) requested a ruling that, pursuant to the reasoning of Rev. Rul. 98-8, the transfer of the QTIP remainder interest to the surviving spouse would not be subject to gift tax.²¹⁷

In rejecting this request and concluding that the proposed transaction would constitute a taxable gift, the Service stated that the conclusion of Rev. Rul. 98-8 (that receipt of the QTIP remainder interest by the surviving spouse would not increase the value of her potential taxable estate) was not pertinent to the federal gift tax consequences of the proposed transfer.²¹⁸ The Service explained:

Rev. Rul 98-8 focuses on what constitutes adequate consideration for transfer tax purposes and concludes that the *receipt* of the remainder interest by the Spouse does not constitute adequate consideration for the *spouse's* transfer to the remainderman. It does not follow that the remainder interest should be valued at zero (or the transfer of the interest should not constitute a gift) when the remainderman (Taxpayer) transfers the interest to the Spouse and receives no consideration in exchange.²¹⁹

The Service concluded that the taxpayer would be transferring a valuable property interest to the spouse and receiving nothing in return, thereby depleting his potential gross estate and making a taxable gift under section 2512(b).²²⁰ Again without explanation or support, the Service asserted that if the proposed transfer were to a third party rather than to the surviving spouse, it would "clearly be a gift." The Service concluded, "[t]he result is the same if the donee is the surviving spouse."²²¹

The result of PLR '033 cannot be reconciled with the result of Rev. Rul. 98-8.²²² If, pursuant to Rev. Rul. 98-8, the sale of a QTIP remainder interest to a surviving spouse for its fair market value constitutes a gift from the surviving spouse in the amount of that value, there should be no gift if the transaction is altered so that the surviving spouse does not transfer any value to the remainderman. If, pursuant to PLR '033, the gift of a QTIP remainder interest to a surviving spouse constitutes a gift from the remainderman in the amount of its fair market value, there should be no gift if the transaction is altered so that the surviving spouse transfers that value in exchange.

216. See *id.* The proposal involved petitioning the local probate court under a state statute that permitted the termination of a trust when, "owing to circumstances unforeseen by the settlor, the continuation of the trust would impair or defeat the settlor's intentions in establishing the trust." *Id.*

217. See *id.*

218. See *id.*

219. *Id.*

220. See *id.*

221. *Id.*

222. See Lipoff, *Remainder Interests*, *supra* note 187, at 119.

Instead, these rulings treat the QTIP remainder interest as having different owners depending on whether the transaction is structured as a gift or a sale. As a result, it is impossible to structure the transfer such that it is not a gift in the amount of the QTIP remainder interest by either the surviving spouse or the remainderman. PLR '033 offers no explanation for this result beyond its statement that the result of Rev. Rul. 98-8 is irrelevant to the transaction at issue.²²³

B. Dropping the Ownership Fiction

These conflicting rulings can be explained by means of the Ownership Fiction's danger. As discussed in Part IV,²²⁴ this danger is encountered when the Ownership Fiction is used in situations in which it has no utility as a "metaphorical way of expressing a truth."²²⁵ The QTIP Rulings address such situations, since they both deal with the economic and property law realities of QTIP ownership. The Ownership Fiction's lack of meaning in these situations becomes apparent as soon as the remainderman disposes of the QTIP remainder interest, exercising a right of actual ownership that directly contradicts the surviving spouse's deemed ownership.²²⁶ PLR '033 acknowledges this lack of meaning and drops the fiction. Rev. Rul. 98-8, in contrast, fails to drop the fiction and proceeds on the assumption that the surviving spouse actually owns the QTIP Property. This leads to the conflicting results of the two rulings.

Returning to Rev. Rul. 98-8 in light of the Ownership Fiction's falsity reveals that both of its arguments ignore the significant change in the surviving spouse's economic and property law rights when she received actual ownership of the QTIP remainder interest. In ignoring this change, they lead to incorrect conclusions. Under the first argument, the Service characterized the transaction as a commutation of the surviving spouse's qualifying income interest and compared it to the sales and commutations characterized as taxable dispositions in the regulations.²²⁷ The examples to which Rev. Rul. 98-8 referred include a surviving spouse's sale of her qualifying income interest to the QTIP remainderman and a sale of QTIP Property followed by payment to the surviving spouse of a portion of the proceeds equal to the value of her income interest.²²⁸ In both cases, the surviving spouse's connection with the QTIP Property terminates because her income interest is liquidated.²²⁹ Also in both cases, all that the surviving

223. See I.R.S. Priv. Ltr. Rul. 99-08-033.

224. See *supra* text accompanying notes 131-53.

225. Fuller, *Fictions I*, *supra* note 23, at 370.

226. See Rev. Rul. 98-8, 1998-1 C.B. 541.

227. See *supra* note 204.

228. See *id.*

229. See Lipoff, *Remainder Interests*, *supra* note 187.

spouse receives in the transaction is the economic value of her income interest.²³⁰ The surviving spouse in Rev. Rul. 98-8, in contrast, received outright ownership of the entire QTIP Property. As a result, the property's value was includible in her transfer tax base under section 2033 and an immediate tax was not necessary to prevent it from escaping transfer taxes. Rev. Rul. 98-8's transaction can therefore be distinguished from the examples to which the ruling refers.

In receiving outright ownership of the QTIP Property, the surviving spouse transferred promissory notes in the value of the QTIP remainder interest. This fact is central to the substance of the transaction as well as to the Service's second argument, in which it claimed that even if its first argument failed, the surviving spouse still made a gift because she did not receive fair and adequate consideration²³¹ for the transfer of the promissory notes. The QTIP remainder interest that she did receive did not constitute fair and adequate consideration because it was already included in her transfer tax base under section 2044.²³² The Service supported this conclusion with a line of cases holding that a husband's transfer of property in exchange for his future wife's relinquishment of marital rights was not made for adequate and full consideration because the assets subject to the marital rights were already includible in his taxable estate.²³³ The Service argued that the case at hand was analogous since the surviving spouse had transferred property to the child in exchange for something that had no effect on the value of her gross estate.²³⁴

This argument fails to distinguish between inclusion in the surviving spouse's estate under section 2044 and outright ownership. The Service stated: "S's receipt of the remainder interest does not increase the value of S's taxable estate because that property is already subject to inclusion in S's taxable estate under [section] 2044."²³⁵ But in receiving the economic and property law rights of outright ownership, the surviving spouse actually received much more value than what was already included in her gross estate. This additional value makes the IRS's reliance on the marital rights cases problematic. In *Wemyss*, a taxpayer transferred assets to his fiancée to compensate for her loss of income under an existing trust that would terminate upon her remarriage.²³⁶ The Court held that the transfer was not for "adequate and full consideration in money or money's worth,"²³⁷ notwithstand-

230. See *infra* text accompanying note 232.

231. See *supra* note 210.

232. See Rev. Rul. 98-8, 1998-1 C.B. 541.

233. See *Merrill v. Fahs*, 324 U.S. 308 (1945); *Comm'r v. Wemyss*, 324 U.S. 303, 303 (1945).

234. See Rev. Rul. 98-8, 1998-1 C.B. 541.

235. *Id.*

236. See *Wemyss*, 324 U.S. at 304.

237. *Id.*

ing the detriment to his fiancée, because marriage cannot be reduced to money value.²³⁸ The Court explained that "to allow detriment to the donee to satisfy the requirement of 'adequate and full consideration' would violate the purpose of the statute and open wide the door for evasion of the gift tax."²³⁹ The Service cited *Wemyss* for holding that detriment to the donee does not constitute consideration. But in Rev. Rul. 98-8, it is not detriment to the remainderman that is satisfying the adequate and full consideration requirement, but rather the spouse's receipt of outright ownership, a benefit that is entirely ignored by both of the ruling's arguments.

In a second case cited by the Service, *Merrill v. Fahs*,²⁴⁰ a taxpayer created a trust for his fiancée with assets worth \$300,000 in exchange for her waiver of marital rights. The Court held that such a waiver did not constitute full and adequate consideration because Congress had provided that under the estate tax, the relinquishment of marital rights did not constitute full and adequate consideration. The Court concluded that the gift tax was to be construed in *pari materia* with the estate tax.²⁴¹

Significantly, a line of cases later distinguished a release of support rights from a release of marital rights, holding that a release of support rights can constitute fair and adequate consideration.²⁴² These cases explain that a waiver of support rights grants a propertied spouse a present value that enhances such spouse's gross estate so that a transfer of an equivalent value, in exchange, does not deplete the estate. A payment made for such a release represents the "liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations."²⁴³ The waiver or support rights can therefore constitute fair and adequate consideration.²⁴⁴

Just as a release of support rights is distinguishable from a release of marital rights because of an immediate benefit to the husband, the

238. See *id.* at 305.

239. *Id.* at 307-08.

240. See 324 U.S. 308 (1945).

241. See *id.* at 313.

242. See Rev. Rul. 68-379, 1968-2 C.B. 414 (acknowledging that the relinquishment by a wife of support rights as contrasted with inheritance rights in an agreement incident to divorce constitutes consideration in money or money's worth); see also *Estate of Rubin v. Comm'r*, 57 T.C. 817, 824 (1972); *Estate of O'Nan v. Comm'r*, 47 T.C. 648, 655 (1967); *Estate of Glen v. Comm'r*, 45 T.C. 323, 338-42 (1966) (distinguishing the release of a presently enforceable claim from an actual or promised relinquishment of dower or curtesy, or a statutory estate created in lieu of dower, curtesy or other marital rights for purposes of constituting consideration in money or money's worth).

243. *Glen*, 45 T.C. at 341.

244. See *id.* at 342.

case at hand is distinguishable from the marital rights cases because of an immediate benefit to the surviving spouse. In the marital rights cases, the property at issue belonged to one spouse and was included in that spouse's estate. The other spouse had no more than a contingent right with respect to such property.²⁴⁵ QTIP Property, in contrast, is included in the surviving spouse's estate, but does not belong to her. When she receives actual ownership, she gains a benefit that she did not have by virtue of estate inclusion under the Ownership Fiction.

In Rev. Rul. 98-8, the Service assumed that the surviving spouse actually enjoyed the property law and economic benefits of full ownership the QTIP Property prior to the transaction. Because she did not, she gained a very real benefit when her deemed ownership became actual ownership. Had the Service dropped the fiction and acknowledged this significant benefit, it would have concluded that the surviving spouse received fair and adequate consideration such that she had not made a gift.

In contrast, the Service dropped the Ownership Fiction in PLR '033 and acknowledged that a remainderman owns the QTIP remainder interest for all purposes other than balancing the initial marital deduction with a subsequent transfer tax prior to such time as all connections with the marital unit are severed. In ruling that a remainderman would make a gift to the surviving spouse in the amount of the QTIP remainder interest if he transferred such interest without receiving consideration in return, the Service acknowledged that the remainderman, and not the surviving spouse, enjoyed the property law and economic rights of ownership of a QTIP remainder interest.²⁴⁶ This correct conclusion conflicts with the incorrect conclusion of Rev. Rul. 98-8 because PLR '033 dropped the Ownership Fiction while Rev. Rul. 98-8 failed to do so.

In producing these inconsistent results, the Service neglected to acknowledge the Ownership Fiction as a conceptual tool, intended to explain but not to create a given legal result.²⁴⁷ Instead, the Service used the Ownership Fiction to achieve its desired legal result of taxing the QTIP remainder interest as soon as possible. In Rev. Rul. 98-8, this meant using the fiction. In PLR '033, it meant dropping the fiction. Ultimately, this meant using the Ownership Fiction for purposes other than serving as a metaphor for a truth, thereby facilitating inequitable results.

245. See *Merrill*, 324 U.S. at 310.

246. See I.R.S. Priv. Ltr. Rul. 99-08-033 (Nov. 30, 1998).

247. Fuller, *Fictions III*, *supra* note 23, at 897-99.

VII. CONCLUSION

This Article has "removed the scaffolding" of the Ownership Fiction from the taxation of QTIP Property. In so doing, it has shown that when a surviving spouse dies or otherwise disposes of her income interest, the QTIP Taxing Provisions consistently rely on the Ownership Fiction for purposes of balancing the earlier marital deduction with a later transfer tax. The resulting taxes are equitable. However, when a remainderman disposes of a QTIP remainder interest during the life of the surviving spouse, the QTIP Rulings do not consistently drop the Ownership Fiction from a situation in which it has no meaning. The results are inconsistent and sometimes incorrect.

In coming to these conclusions, this Article has shed light on the use of legal fictions in general. The Ownership Fiction should be distinguished from the taxation of QTIP Property to understand when it serves as a metaphor for an underlying truth and when it does not. So too should all legal fictions be distinguished from the legal results that they facilitate in order to understand their proper use and avoid their potential dangers.